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C.G. Renshaw v. Tracy Loan & Trust Company, a corporation, as receiver for Walker Brothers Dry Goods Company, a corporation : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

DOCKET NO. 5339D

In the Supreme Court
of the State of Utah

C. G. RENSHAW, *Plaintiff and Respondent,* vs. TRACY LOAN & TRUST COMPANY, a corporation, as receiver for WALKER BROTHERS DRY GOODS COMPANY, a corporation, *Defendant and Appellant.*	Case No. 5339

BRIEF OF DEFENDANT AND APPELLANT

STATEMENT OF FACTS.

Walker Brothers Dry Goods, a Utah corporation, operated a large retail department store in Salt Lake City for nearly two generations. It was one of the oldest and leading mercantile establishments of the western section of the United States, and had been owned by the Walker family until November, 1928 (Abstract 47; Transcript 53) when E. F. Dreyfous acquired stock control. J. R. Walker, was elected President and director in 1903 (Abs. 69; Walker Trans. 30) and occupied those positions even after the control of the corporation passed to Dreyfous (Abs. 79; Walker Trans. 38). From 1903 to November 1928 he was the active head of the business, but after that date, Dreyfous completely ordered its destinies (Abs. 80; Walker Trans. 39) and the plaintiff Walker, was "only a figure head."

Following the entry of Dreyfous into the corporation, the store building of the company in Salt Lake City was remodeled at an expenditure of $320,000.00 (Abs. 79; Walker Trans. 39). Financial difficulties followed which resulted in the appointment of Tracy Loan & Trust Company, a corporation, as equity receiver for the company and the properties by the District Court of the Third Judicial District in and for Salt Lake County on June 25, 1930. The receiver qualified and immediately entered into possession of the assets and business of the company and for a temporary period continued the operation of the department store business.

At least twenty-five years prior to the receivership, the company established a practice of encouraging its employees to "deposit" their surplus funds or savings with the company (Abs. 33; Trans. 41). These funds were repayable on demand (Abs. 77; Walker Trans. 36) and the company paid 6% interest per annum (compounded semi-annually) (Abs. 22; Trans. 30). The "deposits" were evidenced by a small book which simply bore the imprint "Walker Brothers Dry Goods Co." (Exhibits A and B). No rules or regulations covering the so-called deposits were printed in the book nor is there any evidence that any regulations ever existed, except a general understanding of the agreement of the company. In 1929 these "deposits" amounted in total to about $41,000.00 (Abs. 33; Trans. 41). In 1924 they amounted to $60,514.55 (Abs. 74; Walker Trans. 34). For years the company paid or credited the earned interest on the respective accounts of the employees (Abs. 49; Trans. 54). The funds were "withdrawable" on demand of an employee (Abs. 22; Trans. 30). (Abs. 77; Walker Trans. 36).

After Dreyfous acquired control of the business these so-called "deposits" were reduced by repayment to the "depositors". When the receiver was appointed the total of such "deposits" amounted only to $14,688.63, (Abs. 45 and 46; Trans. 52). It also appears that the company employees from time to time received verbal assurance from the control accountant of the company that their funds on deposit were "absolutely safe and if anything ever happened to the store, they would be paid in preference to any one" (Abs. 22; Renshaw Trans. 30; Abs. 51; Trans. 56). The accountant claims to have given these assurances to the employees at the instance and under the orders of J. R. Walker, when he was manager of the business and that Dreyfous, after he became manager, also directed that she inform the employees to the same effect. (Abs. 27; Trans. 35). However, there was no written agreement entered into by the company erecting any specific trust fund protecting these "deposits" of the employees, nor attempting to make the "deposits" preferred claims in event of insolvency of the company.

The employees "deposited" their funds from time to time and in each book, which was held by the employee, the amount of the "deposit" was acknowledged. Interest credits were shown in like manner in the books (Exhibits A and B.) The funds were received from the employees by the company at its regular cashier's window or were paid to the control accountant at her desk (Abs. 30; Trans. 38 and 39). The "deposits" were never ear-marked. (Abs. 31; Trans. 40). The company maintained commercial bank accounts in several of the Salt Lake City banks (Abs. 30; Trans. 39) and funds of the company received in the operation of its large business and the employee "deposits" were deposited in these banks. (Abs. 30; Trans. 39). In making these bank deposits there was no distinction made as to funds received from the employees on "deposit" and the funds representing general income from business operations. (Abs. 29, 30 and 31; Trans. 38, 39 and 40). All money that was received at the store of the company was deposited without distinction as to its source. Employees "deposits" were intermingled with general income and deposited (Abs. 39, 40 and 41; Trans. 47, 48, 49) in the commercial banks. The obligations of the company were paid out of the commercial bank deposits of the company. There was no special bank account representing only the funds of employees "deposited" with the company, and when an employee desired to "withdraw" funds from the company, he was paid by check drawn on any one of the banking depositories of the company. No special bank account was used for this purpose (Abs. 41 and 42; Trans. 48 and 49). There was a complete intermingled and confusion of the employees "deposits" with the general funds of the corporation. (Abs. 34; Trans. 42) (Abs. 41; Trans. 48).

Early in the Walker administration of the company the corporation books showed these employees "deposits" as a liability under the title of "On deposit" (Abs. 25; Trans. 33). A certified accountant questioned the practice as partaking of the nature of a banking business, whereupon the ledger account caption was changed to "Cash due Employees." On the balance sheets of the company the amount due the total employees was always shown as a liability, and it was never represented as a trust fund or a preferred claim (Abs. 71; Walker Trans. 32; Abs. 39; Trans. 47). During the Dreyfous administration the practice remained the same, except that there was an individualization of the accounts instead of carrying but one account in the general accounting set of the company. (Abs. 38; Trans. 45).

The company, for years, placed its surplus funds in time certificates of deposits issued and negotiated by the commercial banks with which it did business. (Abs. 76; Walker Trans. 36; Abs. 48, Trans. 34). When the credit balance in favor of the company at a particular bank accumulated beyond a certain point, a time certificate of deposit would be secured (Abs. 32; Trans. 40;

Abs. 26; Trans. 43) from the bank. These time deposit certificates were for six or twelve months (Abs. 36; Trans. 43), and they represented excess emergency funds of the company (Abs. 29; Trans. 36). They represented at one time a sum greatly in excess of the company's liability to its employees for their so-called "deposits" (Abs. 35; Trans. 43). In 1924 at the time of the company audit, the employees "savings accounts" carried a liability of $60,514.55 (Abs. 74; Walker Trans. 34). The company had time deposits of $42,476.00 (Abs. 76; Walker Trans. 35) a cashier's check of $10,000 and a special bank account of $17,083.85. These represented a reserve "to take care of any emergency" (Abs. 77; Walker Trans. 36).

In purchasing these time certificates of deposit the company did not ear-mark funds received from its employees as savings or "on deposit" and buy a special certificate of deposit with such funds (Abs. 31; Trans. 40). Such funds went into the company's general bank accounts indiscriminately, along with other funds of the company (Abs. 32; Trans. 40), and when the balance at any bank accumulated to a point as to permit the purchase of a time certificate, the certificate was acquired. (Abs. 32; Trans. 40). The certificates carried no indication on their face that they were for any particular purpose. At the time of the appointment of the receiver, no time certificates in favor of the company existed (Abs. 37; Trans. 44). They had been previously cashed and the proceeds used by the corporation in its business.

The plaintiff, C. G. Renshaw, was a trusted employee of the company for 38 years. During all of this period of time he maintained a "deposit" account with the company (Abs. 50; Trans. 56). At the time of the appointment of the receiver there was due Renshaw from the company on account of these deposits the sum $8,370.52. Plaintiff's first cause of action is based on this claim (Abs. 45; Trans. 52).

May Salisbury was also an old and valued employee of the company and during her long period of service she also had a "deposit" account with the company (Abs. 52; Trans. 57). When the receiver took charge there was due her from the company the sum of $2,852.22 (Abs. 45; Trans. 52). Miss Salisbury, after filing her claim with the receiver, assigned her claim to plaintiff and it is the basis of his second cause of action.

Both Renshaw and Miss Salisbury were personally assured from time to time that "you've got nothing to worry about, your money is absolutely safe." (Abs. 51; Trans. 56 and Abs. 23; Trans. 31) and that "their money was absolutely safe, that they could draw it any time * * * and if anything ever happened to the store, they would be paid in preference to any one." (Abs. 22; Trans. 30). These assurances and statements were made by the control accountant of the company who had charge of the employee "Deposits" (Abs. 22; Trans. 31). The accountant claimed she did so on the orders of Walker while he was manager (Abs. 28; Trans. 35) and of Dreyfous after he became directing head of the business (Abs. 23; Trans. 31 and 32).

There is no evidence that either Renshaw or Miss Salisbury ever received any special contract or agreement pertaining to their "deposits." It appears that all employees making "deposits" were treated alike and the arrangements pertaining to the Renshaw and Salisbury accounts were in all respects the same as those relating to "deposits" of other employees. The facts here--inabove related as to the practice and arrangements governing these employee "deposits" apply with especial force to these two accounts.

After appointment of defendant as receiver of Walker Brothers Dry Goods Company, both Renshaw and Salisbury filed their respective proofs of claims with said receiver within the time ordered by the Court having charge of the receivership proceedings. They both set forth in their separate proofs of claim that their respective claims were preferred and entitled to full payment before the common creditors of the insolvent corporation were entitled to particpate in a distribution of the receivership assets. The defendant receiver refused to allow the claims as preferred claims, but approved same as common claims without preference. Thereupon the court, in which the receivership proceedings were and are pending, ordered Renshaw and Salisbury to institute and prosecute plenary actions against the defendant receiver to determine if a preference existed in their favor which would entitle them to full payment of their claims before common creditors of the receivership estate would be entitled to participate. This present action is such plenary action. In the receivership proceedings the court ordered the defendant receiver to set up a reserve of cash funds of $11,268.33 to protect the creditors of the receivership estate who are employee "depositors" as herein designated and described, in the event it was finally determined they were entitled to payment of their claims in full. The court further directed the receiver to pay to these creditors claiming preference, the same dividends as were paid common creditors as and when such dividends were paid, without prejudice as to either the receiver and creditors claiming preference. The receiver has carried out the order of the court in all respects. The reserve fund has been created and the employe "depositors" have been paid dividends in the same proportion as common creditors (Abs. 90; Trans. 16). The trial court in this action found that the assets of Walker Brothers Dry Goods Company are insufficient to pay general creditors more than approximately 55% of the amount of such claims allowed by the Receiver (Finding V; Abs. 90; Trans. 16).

ASSIGNMENTS OF ERROR AND ARGUMENT

Special Note—

The Renshaw claim (first cause of action) and the Salisbury claim (second cause of action) are similar in all respects except as to amounts thereof and it was stipulated in open court (Abs. 52; Trans. 57) "*that Miss Sal-*

isbury would testify the same as this witness (Renshaw) with reference to her deposits." Therefore, as a matter of convenience and brevity this brief treats the situation as if but one cause of action existed. Wherever the words "plaintiff" or "Renshaw" are used they include both Renshaw and Salisbury. The two causes of action must stand or fall together, as the facts pertaining to them are identical.

I.

PLAINTIFF IS NOT ENTITLED TO A PREFERENCE OR PRIORITY IN THE PAYMENT OF HIS CLAIM BY DEFENDANT RECEIVER, BECAUSE (a) THE RELATION BETWEEN PLAINTIFF AND WALKER BROTHERS DRY GOODS COMPANY WAS ALWAYS THAT OF CREDITOR AND DEBTOR; AND (b) THE SO-CALLED "DEPOSITS" MADE BY PLAINTIFF WITH THE COMPANY DID NOT CREATE A TRUST FUND. THEY CREATED AND REMAINED ALWAYS A SIMPLE CONTRACT DEBT DUE FROM THE COMPANY TO PLAINTIFF.

Appellant's assignments of error Nos. 1, 2, 3, 4, 5, 6, 7 (a, b, c, d, e, f and g), 8 (a and c), 9 (a and b), 10, 11, 12, 13, 14, 15 (a, b, c, d, e, f and g), 16 (a and c), 17 (a, b) and 18 involve the foregoing proposition. Therefore, as a matter of convenience they may be discussed together.

Assignments Nos. 2, 3, 10 and 11 are directed against Findings No. 4 of both first and second causes of action, which are identical and are as follows:

> "That at the time of making said deposits, and throughout the time of plaintiff's employment

by said company, the said company solicited said plaintiff and other employees to so deposit their money with said company, and guaranteed said plaintiff and the other employees of said company that said employees, and particularly said plaintiff, could draw their money out at any time, together with interest at the rate of 6% per annum, calculated semi-annually, and represented and stated that their money was always absolutely same and that said employees so depositing had a preference over all other persons and creditors as to the moneys so deposited with said Walker Brothers Dry Goods Company, and that said moneys so deposited would be held by said Walker Brothers Dry Goods Company, as a trust fund in order to encourage their said employees to save their money; that said representations on the part of said Walker Brothers Dry Goods Company, were so made to said plaintiff before and during all the time that said plaintiff deposited said money with said Walker Brothers Dry Goods Company, and continued to be made until the time of the appointment of the defendant as receiver of said Walker Brothers Dry Goods Company, by reason of all of which the said Walker Brothers Dry Goods Company, at the time of the appointment of the defendant as such receiver was indebted to said plaintiff in the said sum of $8,370.52."

Assignments Nos. 4, 5, 12 and 13 are directed against Findings No. 5 of both first and second causes of action, which are identical and are as follows:

"That during all of the time that said plaintiff was so depositing money with the said Walker Brothers Dry Goods Company, said plaintiff believed said representations and relied thereon; by reason of the relationship of said plaintiff as an employee of said company, said plaintiff was entitled to rely upon such representations and all of them and that by reason of said representations said plaintiff believed, at the time of making such deposits and throughout the course of his said employment and until the time of the appointment of the defendant as receiver of said company, that his money so deposited with said company was safe, and that it constituted a preferred claim over all other claims against said Walker Brothers Dry Goods Company and against any and all other claims except those of a similar kind against the defendant as receiver of said Walker Brothers Dry Goods Company, and said claim for said amount, made by said plaintiff, constitutes a first preferred claim against said receiver as such; that within the time provided by order of this court in said receivership matter, said plaintiff duly presented his said claim to the said receiver and claimed a preference over all other claims against said receiver except those of a similar kind, and that said receiver approved said claim against said receiver in the full amount thereof, but has always refused to approve said claim as a preferred claim, and said receiver refuses to pay said amount as a preferred claim and refuses to pay said plaintiff any amount in excess of the percentage that said receiver will pay the general creditors of said Walker Brothers Dry Goods Company and from the assets of said company and from the sums in the hands of the receiver, the said receiver will not be able to pay the general creditors of said Walker Brothers Dry Goods Company, more than substantially 55% of the amount of such claim due such creditors."

Assignments Nos. 6, 7 (a, b, c, d, e, f and g), 14 and 15 (a, b, c, d, e, f and g) are directed against Findings

No. 8 of both first and second causes of action, which are identical and are as follows:

> "The said claim of said plaintiff constitutes a preferred claim against said receiver, and that the money deposited by plaintiff, as alleged in his complaint, was deposited with the said Walker Brothers Dry Goods Company, a corporation, as a trust fund and received by said company as such."

As to each of said Findings (in each cause of action) Nos. 4, 5 and 8, the Appellant asserts that (a) the trial court erred in making the Finding as a matter of law; and (b) that the evidence in the case is wholly insufficient to support said Findings or either of them.

Assignments Nos. 1, 9 (a and b), 16 (a and c) and 17 (a and b) attack the trial court's Conclusions of Law and Judgment (in both causes of action) declaring that plaintiff's claim is preferred and is entitled to priority in payment.

Assignment No. 18 is directed against the trial court's action in overruling defendant's objection to introduction of evidence based on plaintiff's complaint.

Plaintiff's relation to Walker Brothers Dry Goods Company from first to last was that of creditor and debtor. Plaintiff's evidence falls far short of establishing a trust relationship in regard to the so-called "deposits" made by plaintiff with the company. In this connection it is interesting to note that throughout plaintiff's case constant reference is made to "deposits."

At no point did the plaintiff nor his witnesses make any reference to "trust funds". The constant use of this term and that of "savings" by the plaintiff in his own testimony (Abs. 50 and 51; Trans. 56 and 57) indicates that plaintiff at all times had a definite idea as to what he was doing. Undoubtedly he recognized in his transactions with the company the same elements as are involved in "depositing" money in a savings bank. It is established law that the legal relation between a depositor and the savings bank which takes his money is that of debtor and creditor. (See authorities cited infra). Just as a savings depositor loans his money to his savings bank, the plaintiff loaned his funds to the company. The company borrowed from him as it did from banking institutions. The unsecured banks which loaned their funds to the company occupy the same position as that of plaintiff.

In order to escape from this situation and place himself in the position of cestui que trust and the company in that of trustee, plaintiff in his complaint and evidence relies upon two propositions:

(a) That inasmuch as he was an employee of the company, and the relation of master and servant existed between him and the company, it follows that with regard to his loans to the company that a fiduciary or confidential relationship also existed between them; and

(b) That relying upon assurances of the company, that "our savings was absolutely safe, and if anything ever happened to the store we would get our money in preference to any one else" (Abs. 51; Trans. 57) he made the loans to the company and allowed his savings to remain loaned to the company.

In other words, he endeavors to raise a "constructive" trust in his favor, with his "deposits" constituting the trust fund or estate.

1. "A CONSTRUCTIVE TRUST, OR AS FREQUENTLY CALLED, AN INVOLUNTARY TRUST, IS A FICTION OF EQUITY, DEVISED TO THE ENDS THAT THE EQUITABLE REMEDIES AVAILABLE AGAINST A CONVENTIONAL FIDUCIARY MAY BE AVAILABLE UNDER THE SAME NAME AND PROCESS AGAINST ONE WHO THROUGH FRAUD OR MISTAKE OR BY ANOTHER MEANS EX MALEFICIO ACQUIRES PROPERTY OF ANOTHER."

Perry on Trusts (6th Edition) 166;
3 Pomeroy Equity Jurisprudence (4th Ed.) 1044;
California Trust Co. v. Cohn, 300 Pac. (Cal.) 813;
Chadwick v. Arnold, 34 Utah 48, 95 Pac. 527;
Lawley v. Hinckenlooper, 212 Pac. (Utah) at p. 529;
Salina Canyon Coal Co. v. Klemm, 76 Utah 372, 290 Pac. 161;
Tooele County Board v. Hadlock, 11 Pac. (2nd) 322.

From the foregoing authorities it is obvious that fraud is one of the necessary elements in order to enable a court to "raise" a constructive "trust." The court in truth does not "create" a trust: it simply administers trust remedies in its effort to work out justice. The term "fraud", as here used, means legal fraud—not a breach of confidence or of ethics.

2. THE ASSURANCES OR "REPRESENTATIONS" GIVEN BY THE COMPANY TO PLAINTIFF WERE PROMISES OF FUTURE PERFORMANCE OR AS TO FUTURE CONDITIONS AND COULD NOT BE FRAUDULENT, FOR THEY DID NOT REFER TO A PAST OR PRESENT FACT.

It is well established that legal fraud must be founded on a misrepresentation of *past or present facts and that promises as to future acts or conditions cannot form a basis of a fraud or deceit charge.*

> "Representations made by the president of a manufacturing company to an employee in soliciting an accomodation note to temporarily take care of the company's overdraft at the bank, that it would be taken up in a short time, that the company had big prospects, and his statement on renewal that the business of the company was improving every day did not amount to false and fraudulent representations of fact."
>
> Irwins v. Wolcott, 149 N. W. (Mich.) 1035, 183 Michigan 92;
> Brooks v. Pitts, 100 S. E. (Ga.) 776.

> "Fraud cannot be predicated upon representations, however false, which are of a promissory character, or having reference to a future intention of the party making them, or of possible future facts, but only upon false representations of any existing fact either past or present."
>
> Records v. Smith, 126 N. E. (Indiana) 335.

"In the law of torts the wrong of deceit consists in the false statement by words or conduct of present or past material facts, and does not consist of mere promises or conjectures as to future acts or events."

Brown v. C. A. Pierce Co.,
118 N. E. (Mass.) 266.

"That which defendant sought to prove, if it can with propriety be termed a representation at all, was a representation that something should thereafter be done. Such a representation, from its nature, could not be true or false at the time it was made, and if anything, was a contract or promise. The difference between a representation that something exists which does not, and a representation that something shall be done thereafter is obvious."

Knowlton v. Keenan, 11 N. E. (Mass.) 127.

"A statement promissory in its character, that one will thereafter sell goods at a particular price or time, will pay money, or do any similar thing, *or any assurance as to what thereafter shall be done,* or as to any future event, is not properly a representation, but a contract, for the violation of which a remedy is to be sought by action thereon."

Dawe v. Morris, 21 N. E. (Mass.) 313.

"In order to constitute fraud in law, representation must be an affirmance of fact, and not a mere promise or expression of opinion or intention. A promise to perform an act, though accompanied at the time with an intention not to perform it, is not such a representation as can be made the ground of an action for deceit."

> Keithly v. Mutual Life Ins. Co.,
> 111 N. E. (Ill.) 503;
> First Nat'l Bank v. Marcelle,
> 194 N. W. (Minn.) 858;
> Press v. Hair, 133 Ill. App. 528;
> Campbell v. Zion's Coop. etc Co., 46 Utah 1, (at page 14) 148 Pac. 401;
> Papanikolas v. Sampson, 73 Utah 404 at p. 418;
> 12 Ruling Case Law, pp. 237 and 238.

The heart of plaintiff's case is found in the following evidence. The witness, Chase, testified:

> "I told them their money was absolutely safe, that they could draw it out at any time. We paid them six percent interest twice a year and if their money was in for one day, they got their six percent just the same, and if anything ever happened to the store, they would be paid in preference to any one." (Abs. 22; Trans. 30).

The plaintiff testified:

> "* * * Mrs. Chase always mentioned that our savings was absolutely safe, and if anything ever happened to the store we would get our money in preference to any one else, in fact, towards the last, as I walked through the office, and going upstairs I had to go through her office quite often, and I often spoke to her about it, she says: 'You've got nothing to worry about, your money is absolutely safe'." (Abs. 51; Trans. 57).

If there were ever promises as to future conditions or happenings or promises of future performance, these statements made to plaintiff belong in such classification. In addition, the statement that if anything ever happened to the store that plaintiff's funds would be preferred over all other claims is one purely of law and not of fact. ("The representation that the preferred stock would come ahead of everything was not one of fact, but of law." Beverly v. Richards, 238 N. W. (Mich.) 270). And, of course, could form no basis for a charge of deceit.

A study of plaintiff's evidence makes it apparent that Mrs. Chase's statements to the plaintiff were made late in this loan transaction and just prior to the receivership (Abs. 22; Trans. 31 and 32) and long after plaintiff had made the major part of his deposits. (Exhibits A and B; Miss Salisbury made no "deposit" after March 12, 1921) although she received interest credits through the years. There is no evidence in the record that such statements (or "respresentations" as designated by plaintiff) were made to plaintiff when he commenced lending his funds to the company. In truth the testimony leads one to believe that these assurances were made to him after the Dreyfous administration commenced and not previous to that time. (Abs. 22 and 23; Trans. 31). Allowing these assurances or "representations" their full force, no constructive trust can be implied from them because they were not false. They were promises as to future performance or statements as to future conditions and no fraud element is involved in them.

3. THE FACT THAT PLAINTIFF WAS AN EMPLOYEE OF WALKER BROTHERS DRY GOODS CO. AND BELIEVED THE ASSURANCES OR "REPRESENTATIONS" REGARDING THE INDEBTEDNESS DUE HIM FROM THE COMPANY CREATED NO CONSTRUCTIVE TRUST.

That one party to a transaction reposes faith and confidence in the other party which is violated or abused is no ground for adjudging that a trust relation existed between them. There are additional elements which must be present before a court of equity is justified in casting the wrongdoer in the role of "trustee". The usual remedies on the law side of the court can be entirely emasculated or destroyed if the measure is simply whether the wrongdoer violated a trust. The breach of a simple contract is, in an ethical sense, the abuse of trust and confidence, but no court has had the hardihood to make the contract breaker a "trustee". Although plaintiff was an employee of the company and believed the assurances or "representations" made to him that his funds were safe and that he would be a preferred creditor if the company became insolvent, there is no basis found in these facts which operate against his plain and obvious status of general creditor. This status was organic in his transactions and relations with the company and was not changed by assurances as to his legal status or safety of his loan to the corporation.

> "Where one person employs another as an agent, loans money or sells property on credit, a confidence and trust is imposed, to a greater or

less extent, and yet such transactions have never been regarded by courts as falling within any recognized class of trusts."

Weer v. Gand, 88 Illinois 490.

"The various affairs of life in almost every act between individuals in trade and commerce involve the reposing of confidence or trust in each other, and yet it has never been supposed that because such a confidence or trust in the integrity of another has been extended and abused, that therefore, a court of equity would in all such cases assume jurisdiction."

Doyle v. Murphy, 22 Illinois 502.

"It is true that uses and trusts are a favored part of the jurisdiction of the chancellor, and frequently he will on that ground, decide in cases where the law may be adequate to give relief. But, notwithstanding this acknowledged authority, it cannot be extended to every case where one party has trusted another, or in other words, place a confidence which has been abused. If so, every case of bailment, and every instance of placing chattels, by loans or hire, would be swallowed up by courts of equity. Nay, every case where credit, was given for debt or duty, would soon be drawn into the same vortex."

Ashley's Administrators v. Denton,
1 Litt. (Ky.) 86.

"Something more than a trust reposed in one is required to make him a 'trustee' according to its intent."

People ex rel Smith v. Commissioner,
100 N. Y. 215, 3 N. E. 85.

> "In almost all of the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act."

> Wilson v. Kirby, 88 Illinois 566;
> Chapman v. Forsyth, 2 Howard (U. S.) 202.

4. THE AGREEMENT TO PAY INTEREST AND THE ACTUAL PAYMENT OF INTEREST TO PLAINTIFF ON HIS ADVANCES TO THE COMPANY, IS A STRONG INDICATION THAT PLAINTIFF AT ALL TIMES WAS BUT A COMMON CREDITOR OF THE COMPANY.

The fundamentals of the transactions between plaintiff and the company clearly demonstrate that he *loaned* his funds to the company and the company *borrowed* the same from him. The company agreed to pay him interest and did in truth pay the interest (Abs. 22; Trans. 30) for the use of his funds. There can be no trust relationship deduced from this agreement to pay interest. In truth the agreement to pay interest connotes a debt—not a trust fund. *"If a man pays interest for money he must be entitled to the use of it. When a man locks up money which is intrusted to him in a box, he does not pay interest on it". In re Broad 13 Queens Bench Division 740.* The company borrowed *call* money from plaintiff. *"Interest is the compensation paid for the use of money. It is allowed on the ground of some contract, express or implied, to pay it, or as damages for the breach of some contract or the violation of some duty".* Arizona Eastern R. Co. v. Head, 26 Arizona 259, 224 Pac. 1057. *"In-*

terest is the compensation allowed by law, or fixed by the parties, for the use or forebearance of money, or as damages for its detention." 15 R. C. L., Sec. 1, page 3.

The agreement of the company to pay plaintiff interest on his advances to the company, plainly stamps the transaction as one between debtor and creditor. Upon receipt of his funds the company could do what it desired with them. It was not to invest them in a trust fund for his benefit and then pay him interest on them. It was intended that it use them in the company business and pay him interest for such use of his money.

5. THE VIOLATION OF A CONTRACT DOES NOT OF ITS OWN FORCE GIVE RISE TO A CONSTRUCTIVE TRUST. THERE MUST BE OTHER ELEMENTS PRESENT BEFORE A COURT WILL CONVERT A COVENANT BREAKER INTO A TRUSTEE.

If it be assumed that the company entered into a formal contract with plaintiff at the time it first borrowed his money, wherein it agreed that in event of insolvency his claim would be preferred, we ask how much consideration would be given to it as against the rights of other creditors who loaned their money or sold their merchandise to the company? No such agreement is relied upon by plaintiff and yet in face of the fact that he for years advanced his funds to the company and received compensation for their use, it is claimed that assurances or "representations" made long after the establishment of the relationship made him a beneficiary under a constructive trust. The difficulties in his contention are well illustrated by the case of Blakey v. Brinson, decided by the Supreme Court of the United States on May 16, 1932 and found in Vol. 52, Supreme Court Reporter 516—Advance Sheet No. 14, June 1, 1932, was an action against the receiver of a national bank. We quote the facts from Mr. Justice Stone's opinion (this was a unanimous decision):

> "Respondent maintained an interest-bearing savings account with the bank, in which his credit balance on October 14, 1929, was $1,961.31. Shortly before that date, respondent had had conversations with an officer of the bank, in the course of which the latter signified the willingness of the bank to purchase $4,000.00 of United States bonds for respondent. On October 10, he stated to respondent that the bank would send to Richmond for the bonds, and asked him to bring to the bank on the 14th such amount, in addition to his credit balance, as would be required to pay for the bonds. On the latter date respondent drew a check for $2,100 upon another bank, which he deposited in his savings account, thus increasing his deposit balance to $4,061.31. On the 15th, the same officer of the bank informed respondent that the bonds had been ordered, and on the 19th said to him, 'I have your bonds', and handed to him a charge slip which stated: 'This is to advise you that we have this day charged your account as follows:

4,000 Fourth L. L. 4¼ % Bonds	$3,960.00
Acc. Int.	.60
Commission	4.00
	$3,964.60

On October 21, the bank charged respondent's savings account on its books with $3,964.60, and credited a like amount as a 'deposit' in a 'bond account' appearing on its books. The bond account contained only a daily record of credits in the account of checks and deposits and their total, without any reference to respondent or any other customer of the bank. The nature and purpose of the account does not otherwise appear. When the bank closed its doors on October 26, it was discovered that in fact no bonds had been purchased, ordered, or received for the respondent. The only transactions had with respect to respondent or his account were the conversations with the officer of the bank and the entry of the debit and credit items mentioned.

On these facts, the District Court concluded that the bank had received the $3,964.60 in trust for the purpose of purchasing the bonds, and that, as the funds in the hands of the receiver had been augmented by the wrongful commingling of the trust fund with the other funds of the bank, respondent was entitled to payment in preference to the general creditors of the bank. The Court of Appeals thought that the trust arose only on the 19th, when the bank stated that respondent's account had been charged with the purchase price of the bonds, but reached the same conclusion as respects the increase of the funds in the hands of the receiver and the right of respondent to preferential payment. The petitioner insists, as matter of law, that no trust ever came into existence as the result of these transactions. * * *

"It would have been equally competent for respondent to have provided for the purchase of the bonds either by the creation of a trust of funds in the hands of the bank, to be used for that purpose, *or by establishing a credit to be debited* *with the cost of the bonds when purchased.* But only if the former was the method adopted could respondent, upon the bank's insolvency and failure to purchase bonds, recover the fund or its proceeds, if treaceable, in preference to general creditors. * * * The relationship established between the bank and respondent by his savings account was, from its inception, that of debtor and the credit balance of $1,961.31 in respondent's account on October 14 represented the amount of the bank's indebtedness to him. * * * The situation thus created continued without change until the 19th, when the bank's officer advised respondent that the bonds had been purchased. If the advice was true, as respondent believed it to be, he was then called upon to pay to the bank the amount of the purchase price, and the bank proceeded, with the assent of the respondent, to liquidate the supposed obligation by charging his savings account with the exact amount of the stated purchase price, with interest and commissions added. We can find in this method of discharging a supposed obligation no hint of an intended alteration of the debtor and creditor relationship, with which respondent had been content from the beginning, to that of trustee and cestui que trust.

The court below thought that the legal consequence to be attributed to the debiting of the account with the supposed purchase price of the bonds was the same as if the respondent had cashed a check for the amount and had then proceeded to hand the money back to the bank under a specific agreement between him and the bank that the money was to be held as a special fund, for the sole purpose of completing the purchase. This view is not without support.

* * * * * * * *

> Such a procedure, if actually carried out, might afford a basis, which is lacking here, for the inference that respondent, no longer content with the role of creditor, had sought to establish a trust fund. But the mere debiting of his account, without more, for the reimbursement of the bank for the obligation which it was supposed to have incurred or paid, lends no support to such an inference. The cancellation of the credit balance by the debit neither suggests any intention to establish a trust nor points to any identifiable thing which could be the subject of it."

We quote this decision at length because of the similarity of the legal positions of plaintiff in the case at bar and of Brinson in the cited case. *They trusted their respective debtors to perform their respective alleged agreements; they depended on their debtors remaining solvent until the agreements were executed. They accepted the promises of their debtors and their apparent financial abilities to perform.*

The fact that the plaintiff relied upon the company's assurance that his funds were safe and that he was a preferred creditor did not change the legal relationship of the parties in regard to funds loaned by plaintiff. Plaintiff had always been a general creditor of the corporation and he so remained. He was content to remain in that role and did not depart from it, and the assurances he received from Mrs. Chase, as company representative, had no effect on this relationship. His credit balance was not paid to him, and by him returned to the company on a specific trust so that particular funds were segregated from the general funds and assets of the company. As further sustaining appellant's position there are cited:

Northern Sugar Corporation v. Thompson, 13 Fed. (2nd) 829;

Noyes v. First National Bank, 167 N. Y. Supple. 288;

Craig v. Bank of Granby, 210 Mo. App. 334;

Wetherell v. O'Brien, 140 Ill. 146;

Mutual Accident Assn. v. Jacobs, 141 Ill. 261;

Fralick v. Coeur D'Alene B. & T. Co., 36 Idaho 108, 210 Pac. 586;

Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252, 17 Law. Ed. 785;

Commercial Bank of Penn. v. Armstrong, 148 U. S. 50, 13 Supt. Ct. 533, 37 L. Ed. 363;

Minard v. Watts, 186 Fed. 242;

Fallgatter v. Watts, 11 Fed. (2nd) 383;

Phoenix Bank v. Risley, 111 U. S. 125;

Fidelity Assn. v. Rodgers, 180 Cal. 683, 182 Pac. 426;

Schenck Chemical Co. v. Industrial A. and D. Co., 121 N. Y. Supple. 838;

Yorkshire Investment Co. v. Fowler, et al., 78 Fed. (C. C. A.) 56;

Mahle v. Sanche, 79 N. E. (Ill.) 9;

Tucker v. Limer, 57 Atlantic (N. J. Equity) 1017;

Reddington v. Lanahan, et al., 59 Maryland 429.

6. THAT PART OF FINDING NO. 4 (OF BOTH CAUSES OF ACTION) READING: "SAID COMPANY * * * REPRESENTED AND STATED * * * THAT MONEYS SO DEPOSITED WOULD BE HELD BY SAID WALKER BROTHERS DRY GOODS COMPANY AS A TRUST FUND IN ORDER TO ENCOURAGE THEIR SAID EMPLOYEES TO SAVE MONEY" IS WHOLLY UNSUPPORTED BY ANY EVIDENCE AND IS CLEARLY ERRONEOUS.

If reference is made to the testimony of the witness, Chase, (Abs. 22, 23, 24, 25, 26, 27; Trans. 30, 31, 32, 33); of the plaintiff (Abs. 50, 51; Trans. 55, 56, 57) and the witness, Walker (Abs. 76, 77; Walker Trans. 36 and 37) it will be plainly seen that no such statement or representation as quoted above in this finding was ever made to plaintiff or to Miss Salisbury. At no time was there ever any mention of any trust fund "to encourage their said employees to save money." This clause is but a legal conclusion of counsel and the record is entirely silent as to any such representation being made to plaintiff or to Miss Salisbury. The following citation is in point:

> "This complaint, in effect alleges, conversion of money by defendant and the facts therein stated utterly fail to bring the case within the domain of equity, as the elements necessary to create the relation of trustee and cestui que trust are not shown to exist. True plaintiff in his complaint designates the money he seeks to recover as a trust fund, but this, however, is only the conclusion of the pleader. The relations of the parties to each other, because of and which grow out of the transaction in question, must be determined by the facts, what they did in the premises

and not by what the pleader chooses to label or call it in his pleading."

Francis v. Gisborne, 30 Utah 67, 83 Pac. 571.

Plaintiff and witness, Chase, probably did not know what was meant by a "trust fund" and in all of their testimony they never used the words "trust fund". This clause in Finding 4 (both causes) is taken verbatim from paragraph 4 (both causes) of the complaint. In addition to the fact that there is absolutely no evidence to support it, the clause falls into the error of attempting to make a promise—"that moneys so deposited would be held * * * as a trust fund"—for future performance, do the work of a representation of a past or present fact. (See paragraph 2 of this section of brief.)

From the foregoing discussion and authorities it is submitted:

1. That plaintiff's complaint does not state a cause of action entitling him to claim a preference in the payment of his claim and hence defendant's objection to the introduction of evidence should have been sustained;

2. That the evidence shows that plaintiff was at all times a simple contract creditor of Walker Brothers Dry Goods Company, without right of preference;

3. That no constructive trust in favor of plaintiff exists.

II.

THE FUNDS PAID BY PLAINTIFF TO WALKER BROTHERS DRY GOODS COMPANY WERE NOT HELD IN ANY SPECIAL DEPOSIT OR FUND, BUT WERE INTERMINGLED AND CONFUSED WITH THE INDIVIDUAL OR CORPORATE FUNDS OF THE COMPANY AND WERE USED IN THE COMPANY BUSINESS. IT IS IMPOSSIBLE TO TRACE AND IDENTIFY THE FUNDS OF PLAINTIFF AS ENTERING INTO SOME SPECIFIC PROPERTY, SECURITY OR ASSET OF THE INSOLVENT CORPORATION WHICH CAME INTO THE HANDS OF THE RECEIVER. HENCE, EVEN IF A TRUST WAS CREATED IT MUST FAIL AND PLAINTIFF IS BUT A GENERAL CREDITOR.

Assignments of error 7(h, i, j and k), 8 (b and d), 9 (c, d and e) and 17 (c, d and e) involve the above proposition of law.

There is positive evidence in the record as to the methods pursued by the company in handling funds loaned to the company by its employees.

The employee "deposits" after having been received by the company were commingled indiscriminately with funds of the company received from its daily sales and other sources. (Abs. 30 and 31; Trans. 38 and 39). These company funds were deposited daily in the banks, and in making up the deposits no distinction as to funds representing employees' savings and funds representing sales were made. They were all put together. The company had no special bank account in which the employees' savings were kept alone. (Abs. 31; Trans. 39; Abs. 34; Trans. 42). The employees' savings were not ear-marked. (Abs. 32; Trans. 40). The company maintained several banking depositories and when the credit balance in favor of the company in a particular bank would reach a certain point, a time certificate of deposit would be purchased from such bank. (Abs. 32; Trans. 40; Abs. 36; Trans. 43), but at no time was a certificate of deposit purchased which contained only the funds of employees which had been paid over to the company. (Abs. 31; Renshaw Trans. 40). These certificates of deposit were "emergency funds" and were intended to take care of "anything in an emergency." (Abs. 76; Walker Trans. 36). There were no time certificates of deposit owned by the company on date of the appointment of the receiver. They had all been cashed prior to that date and used in the company business. (Abs. 37; Trans. 44).

"When it came to making deposits no distinction as to funds representing employees' savings and funds representing the sales was made. They were all put together." (Abs. 30 and 31; Trans. 38 and 39). Time deposit certificates were acquired with bank credits, which contained general receipts of the company and the employee loans. (Abs. 31; Trans. 40).

It will be noted that in each instance the funds representing employee loans were deposited in company banks. There is no evidence that any other disposition or use were ever made of them. The obligations of the company were paid from the common fund at the banks, composed of receipts from all sources. (Abs. 41; Trans. 48).

The legal principles involved in the situation presented by the evidence in this case cannot be subject to any serious dispute. The Supreme Court of Utah has definitely elucidated the rules of law which govern in this jurisdiction. The appellant therefore submits the following authorities, which support its position as set forth above.

> "The doctrine of equity, as regards property disposed of by persons in a fiduciary position, is that whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, *provided only he can identify them.* If they cannot be identified, by reason of the trust money being mingled with that of the trustee, then the cestui que trust is entitled to a charge upon the new investment to the extent of the trust money traceable into it; that there is no distinction between an express trustee and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position, and that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account."
>
> Sir Geo. Jessel, Master of the Rolls; quoted with approval in National Bank vs. Insurance Co., 104 U. S. 68, and adopted as the rule in Utah in Waddell vs. Waddell, 36 Utah 435; 104 Pac. 743.

"The courts have frequently considered and passed upon claims like the one before us, but we know of no case where it has been held that a trust could be impressed on property or funds where it is conceded to be impossible to trace or identify the property or funds, either in its original or substituted form * * * . It was not held in the Waddell case (36 Utah 435) nor in any other, so far as we are aware, that a court has ever impressed, or has attempted to impress, a trust upon certain property or upon a certain fund where the original trust property or trust fund can no longer be traced or identified, either in its original or substituted form."

Kent vs. Kent, 50 Utah 44, 165 Pac. 271, 15 L. R. A. (N. S.) 1100.

"Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the cestui que trust. No change in its state and form can divest it of such trust. So long as it can be identified, either as the original property of the cestui que trust, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a bona fide purchaser, for a valuable consideration, without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fails. This is always the case when the subject matter is turned into money and mixed and confounded in a general mass of property of the same description."

Thompson Appeal 22 Penn. State 16.

"A trust creditor is not entitled to a preference over general creditors of the insolvent merely on the ground of the nature of his claim. To authorize such a preference, some specific recognized equity founded on the relation of the debt to the assets in the hands of the assignee or receiver, and which entitles the claimant, according to equitable principles, to a preference in payment out of those assets, must be established by evidence. The person claiming to be a trust creditor must in order to establish his right to a preference, trace the trust money into some specific property, fund, security, or account of the insolvent which has passed into the hands of the receiver or assignee, and the proceeds of which are to be distributed. He must identify the fund out of which he demands to be preferred in distribution either as the original trust property or as a product of it * * * The right to pursue the fund fails when the means of identifying and ascertaining it fails."

Groff vs. City Savings Fund & Trust Co., 46 Penn. Superior Ct. 423;
Lifter vs. Earl Co., 76 Penn. Superior Ct. 173;
Corporation Commission v. Merchants Bank & Co., 138 S. E. 23 (S. C.)

"The authorities are generally agreed that the right of the cestui que trust to reclaim trust funds in specie, or impress a trust upon other property in the hands of the trustee, is founded upon the right of property and not on the grounds of compensation for its loss, and hence the beneficiary of a trust fund is not entitled, merely because of the character of its claim, to payments out of the insolvent trustee's assets in preference to general creditors, but must trace and identify the trust funds in order to reclaim them * * *. There are, however, well-established principles which govern the duties of a cestui que trust, as depositor in a bank, who seeks to trace and reclaim his fund. It is well settled that, when a trustee wrongfully commingles trust funds with his own funds, equity will impress the trust upon the entire mass with which the trust fund has been commingled in order to permit the reclamation of the trust fund. Waddell v. Waddell, 36 Utah, 435, 104 P. 743. The leading case in which the principles applicable to this situation were announced is the English case of In re Hallet's Estate, 13 Law Rep., Chancery Div. 696. There the rule was laid down, which has since been followed with almost unbroken uniformity, that the cestui que trust will not be called upon to identify particular money constituting his trust fund, but that, if the trustee has mingled the trust funds with his own, the entire mass is impressed with the trust to the extent of the amount of the trust funds, and, where the trustee has made payments from the mingled fund he will be presumed to have expended for his own use and benefit, first, his own money, and, lastly, the trust fund, and that the cestui que trust will be permitted to recover from such mingled fund, and in preference to common creditors, the amount of money representing the lowest balance to which the mingled fund fell from the inception of the trust to the date of insolvency. There may be some qualifications to this general rule, but, so far as this case is concerned, the principles stated are applicable. The rule is also stated as follows: "The same rule as to identifying or tracing the funds applies to public as to private funds. The money must be identified or traced into some other specific fund or property. There is a presumption, however, that what remains at the time of insolvency is a trust fund. The law presumes that trust funds were not appropriated and that a balance of cash in the hands of the depository is the trust funds." 22 R. C. L. 231.

"In case the mingled fund is sufficient to pay the trust claimant in full, the presumption is that only the money of the trustee has been expended, but, where the trustee has expended, not only his own money out of the mingled fund, but has also dipped into and expended part of the trust fund, the trust claimant will be entitled to recover only the amount which remains, and he is entitled to recover this, even though the balance is less than the total of the trust fund."

> Tooele County Board vs. Hadlock, 11 Pac. (2nd) at pgs. 324 and 325.

"But aside from this view of the evidence, the claim to a general charge upon any and all property acquired by the board, through the use of the general funds of the bank with which this trust fund has been blended is not supported by the weight of authority; nor do the cases decided by this court go so far. That the misuse of this trust fund has gone to swell, in one form or another the general assets of the bank, is not enough to charge the whole with a lien, will not be seriously contested. The cases which deny such a contention are numerous. *To impress a trust upon the property of a tort feasor who has used the trust fund in his private affairs it must be traced in its original shape or substituted form.*"

> Crawford County vs. Strawn, 157 Fed. (C. C. A.) 1100, 15 L. R. A. (N. S.) 100;
> Schuyler vs. Littlefield, 232 U. S. 707.

"But we believe the majority doctrine is based upon sound principles and should be adhered to. Where no specific lien is created by contract, or acts of the parties, none exists. The only course open to equity is to discover the corpus of the trust fund or to follow the changes of transmutations of the trust moneys into some particular property or fund that can be charged with the trust, saving of course the rights of innocent purchasers for value."

Myers, Receiver v. Matusek, 98 Florida at p. 1145, 125 Southern 360.

"The result of these decisions is that merely showing that the trustee has received trust funds will not impress a lien upon his assets unless it is shown that his asset were not increased by the misappropriation. But the great weight of authority is against this view."

Perry on Trusts, (7th Ed.) Sec. 836.

"When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in this tracing and following the trust money; but when as a matter of fact, it cannot be traced, the equitable right of the cestui que trust to follow it fails. Under such circumstances, if the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remains; he may have lost it with property of his own; and in such case the cestui que trust can only come in and share with the general creditors."

Little vs. Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570.

"As a consequence there have been decisions in some American states to the effect that if one's general estate has been enriched by the proceeds of trust property, the trust may be established against the general assets even though the estate is insolvent * * *. But these cases have been either expressly overruled or greatly limited and qualified. * * * In some states it has been held that, while it is not enough to show that the trust property went in to the general assets, it is enough to charge the whole estate with a trust, if it can be shown that the proceeds remained unexpended somewhere in the estate. * * * But by the great weight of authority, a trust cannot be established against the proceeds of trust property, which has been disposed of, unless the proceeds can be identified and traced into some specific fund or property. This is the doctrine of In re Hallet's Estate (13 Ch. Dw. 696) to which we have already referred."

Lowe v. Jones, 192 Mass., 94, 78 N. E. 42
6 L. R. A. (N. S.) 487;
Atkins vs. Atkins, 180 N. E. (Mass.) 613.

"Before a cestui que trust can claim specific real or personal property, he must show that it is the identical property originally covered by the trust or that it is the fruit or product thereof in a new form."

Lathrop v. Bampton, 31 California 22.

"To justify a recovery a beneficiary must be able to follow and identify the property either in its original or substituted form."

Orcutt vs. Gould, 117 Cal. 315, 49 Pac. 188;
Elizade v. Elizade, 137 Cal. 634, 66 Pac. 369;
Estate of Arms, 168 Cal. 554;
Holland vs. Bank of Italy, 1 Pac. (2nd) 1031.

"It is not enough that the Estate of Lemon may have been indirectly increased by reason of his having used the trust fund to pay his own debts."

> Martin vs. Smith, 33 Idaho 692, 197 Pac. 823.

"The right of a beneficiary to reclaim a trust fund is based upon his right of property, not upon any right as a preferred creditor of the trustee."

> Chase & Baker Co. v. Olmsted, 93 Wash. 306, 160 Pac. 952;
> Heidelbark v. Campbell, 95 Wash. 661, 164 Pac. 247.

"The proof does not definitely trace the proceeds of the sale of the converted property into the cash on hand or into any specific assets of the bank. It merely shows that the proceeds of these securities went into and swelled the assets of the bank, and thereafter they were used as all other assets in the ordinary operation of the bank. Under such circumstances, the judgment of the court was erroneous in impressing a trust on the entire assets of the bank."

> Tyler County State Bank v. Shivers, 6 S. W. (2nd) (Texas) 108;
> Prior v. Davis, Administrator, 109 Alabama 117, 19 South 440;
> Matter of Cavin vs. Gleason, 105 N. Y. 256;
> Maged v. Bank of United States, 234 App. Div. (N. Y.) 295, 254 N. Y. Suppl. 569;
> Schneider vs. Winchester Development Co., 149 Atlantic (N. J.) 636;
> Commonwealth vs. Tradesmen's Trust Co., 95 Atl. (Pa.) 574;
> O'Neil vs. Cleveland, 223 N. W. (Wisconsin) 82;
> Rainwater vs. Wildman, 289 S. W. (Arkansas) 488.

The testimony of Mrs. Chase and J. R. Walker shows without qualification that all employees' savings deposits, after being intermingled and confused with corporate funds received from all other sources, were deposited in one or more of the banking depositories of the company. There was no special bank account to receive these employee deposits, and they were considered as part of the general funds of the company for use in its business activities. The evidence further shows that these bank credits were drawn upon without reference to the source of origin of the credits. The general obligations and expense of operation were paid from them, and when an employee "depositor" desired to "withdraw" any of his "deposits" they were given a check upon any of the depository banks without regard to the source of the funds on credit. (Abs. 41; Trans. 48).

On the assumption that plaintiff's funds or savings when paid to the company became a trust fund and not a debt (we have clearly demonstrated above the error of such assumption) the first step plaintiff is compelled to take is to trace these funds from the intermingled bank accounts where they had been confused with other corporation funds. This he apparently attempted to do by testimony of Mrs. Chase, and of J. R. Walker regarding time certificates of deposit. (Abs. 75, Walker Trans. 35; Abs. 76, Walker Trans. 36 and 37; Abs. 27, Trans. 34; Abs. 29, Trans. 36). In order to connect the employees' deposits with these time certificates of deposit Walker testified (Abs. 78; Walker Trans. 37):

A. "Well, we had those special deposits there to take care of the special accounts and other items as I stated before, those special accounts were the only liability we had that was due on demand."

Mrs. Chase stated (Abs. 29; Trans. 36):

A. "This is what I meant by 'emergency'; we had some employees that had, say as high as ten thousand dollars deposited, if they should want to draw that ten thousand out, but we didn't have the money in our *checking account, or in the till,* we could draw it out of this emergency account to pay them, this special account, if we had to do that."

From this and like testimony it is evident that plaintiff is attempting to claim that these time certificates of deposit were a trust fund to protect the employees' saving "deposits", but it should be noted that even on plaintiff's own evidence this position must fail, because

(a) Walker in his own testimony admits these time certificates of deposit were "*a reserve account to take care of anything in an emergency*" (Abs. 76; Walker Trans. 36) and "we had those special deposits there to take care of the special *accounts and other items* * * * " (Abs. 78; Walker Trans. 37).

(b) Mrs. Chase states if "*we didn't have that money in our checking account or in the till*" we could draw it out of this emergency account to pay them. (Abs. 29; Trans. 36).

These statements belie the claim that the time certificates of deposit were a trust fund set up to protect the employees' saving "deposits", because they reveal two definite facts which in themselves contradict plaintiff's theory: *First;* the time certificates were to protect "*anything in an emergency*"; and secondly; "withdrawals" by employees were made from these time certificates only if "*we didn't have that money in our checking account or in the till.*" How can it be successfully claimed that the time certificates were a trust fund for the benefit of the employee "depositors" when these two admissions are made?

However, aside from the intrinsic condition of plaintiff's evidence, plaintiff must depend upon Mrs. Chase's testimony given below to show that the employees' saving funds went into the time certificates (Abs. 31; Trans. 40):

> "Q. You didn't ear mark that money so it would go right over to the Continental to pay a time certificate, did you?
>
> A. No.
>
> Q. You didn't ear mark it so it would be Mr. Renshaw's to buy a certificate of deposit, did you?
>
> A. No.
>
> Q. But that went into the general account indiscriminately?
>
> A. Yes."

and also (Abs. 35 and 36; Trans. 43):

> "Q. What was the practice in buying these time certificates of deposit, how often would you buy them?

A. I don't remember.

Q. Would you do the actual purchasing of them, or would Walker or Dreyfous, or who attended to that?

A. Well, the Manager of the store would tell us when to get them.

Q. And then you would draw a check on your general account?

A. Yes, sir.

Q. Depending, one time if the National Copper had a surplus balance, you would buy the certificate of deposit at that bank?

A. Yes."

This evidence clearly shows that (a) time certificates of deposit were purchased from the general bank accounts of the company and that (b) no certificates were purchased which represented employees' "deposits" exclusively. It is left to guesses and surmises as to whether or not these time certificates of deposit were purchased with plaintiff's funds. The chances are equal as to whether or not any of his funds went into the time certificates. Certainly there is no positive and direct evidence that such was the fact. The most favorable aspect of plaintiff's evidence at this point leaves it to a matter of conjecture.

If, however, we accept a pure assumption or guess that plaintiff's funds went into time certificates, the next step in tracing the funds is wholly fatal to plaintiff's cause for note Mrs. Chase's evidence: (Abs. 37; Trans. 44):

> "Q. You want your evidence to stand that at the time the receiver was appointed, there were no time certificates?
>
> A. No, none then."

and also (Abs. 37; Trans. 44).

> "Q. But you know there were none in existence at that time?
>
> A. Not at the time of the receiver."

It is therefore plain that prior to the date the receiver was appointed, these certificates of deposit had been cashed and the proceeds used in the transaction of the company business. *Certainly no time certificates came into the hands of the receiver.* Thus ends plaintiff's trust fund search. He can go no further in his proof.

Under the authorities cited above and in accordance with the Utah rule, plaintiff must trace his money into some specific fund or property, and "where the original trust property or trust fund can no longer be traced or identified either in its original or substituted form" the trust fails and plaintiff stands as a general creditor. He cannot claim a lien on the general assets of the corporation, for the Utah Supreme Court has expressly and emphatically adopted the majority rule which refuses to extend the principle of tracing trust funds beyond its logical scope. The evidence shows that (a) Plaintiff's funds were intermingled and confused with the income from all other sources and thus confused were deposited in one or more of the company banks; (b) that it may be only conjectured that all or some part of plaintiff's funds were used to purchase time certificates of deposit, and (c) all time certificates were cashed and used in the company business and none reached the hands of the receiver.

Under the rule announced in Utah in the Kent case (supra) and Tooele Bank case (supra) (and which is the majority rule), plaintiff has failed to trace any of his funds into property or assets of the receivership estate, but contra has shown that if the funds found their way into the time certificates of deposit, all such certificates had been cashed and the proceeds expended prior to the appointment of the receiver. Hence, the so-called "trust fund" failed when the means of tracing it failed. His right to follow his alleged "trust funds" failed with proof that none of the certificates of deposit reached the receiver's hands. The certificates were the end of his trail. He made no proof that any of his funds were a part of the assets of the company which the receiver received. His proof was directed towards the certificates of deposit and when his trail ran blind be cannot now retrace his steps in the direction of the general assets of the company and claim a preferred lien thereon because he has no claim on the general assets (other than that of a common creditor) upon his failure to identify his alleged "trust funds" either in its original or transmuted form.

From the foregoing discussion the following conclusions are logical:

I.

The plaintiff Renshaw and his assignor, May Salisbury, were at all times common creditors of Walker Brothers Dry Goods Company. There was no fiduciary relationship between them and the company. They intended the company to use their funds in the conduct of its business and in return receive compensation in the form of interest.

II.

If the funds paid by plaintiff and Miss Salisbury to the company were trust funds, they became so intermingled and confused with other funds of the company that their identity has been lost and plaintiff failed to trace them into any property or assets coming into the hands of the receiver; hence he will be relegated to the position of common creditor.

It is submitted that the judgment in this case allowing plaintiff a preference, should be reversed, with instructions to the trial court to enter judgment decreeing him and his assignor to be common creditors without preference.

Respectfully submitted,

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